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Clinging to my turtle

A rejoinder to Richard Bellamy and Adrienne Stone

Cormac Mac Amhlaigh*

Richard Bellamy and Adrienne Stone have provided thoughtful responses to my article “Putting Political Constitutionalism in its Place.”¹ I am very grateful to them for taking the time to engage with my argument as well as the editorial board of I•CON for organizing the responses and allowing me this brief rejoinder.

The argument I defend in the article, in a nutshell, is that given the fact that we should expect disagreement about whether legislative supremacy is the fairest way to make decisions about rights, arguments about legislative supremacy require something more if they are not to descend into infinite regress (“turtles all the way down”)² and therefore become self-defeating. In the article, I propose a minimal theory of legitimacy as an additional element of a theory of political constitutionalism in order to deal with this problem. The minimal theory provides a presumption in favor of the legitimacy of a reasonably just, reasonably effective governing regime all other things being equal. Both responses identify two worries with this position. The first worry is that we will also probably disagree about whether the minimal theory is, itself, sufficient for the legitimacy of a governing regime; and the second worry is that we will disagree about the point at which the presumption in favor of the legitimacy of the minimal theory will be defeated.

The first worry involves the contention that, in using a minimal theory of legitimacy to respond to the problems I argue affect political constitutionalism, I am hoist with my own petard given that this can be turned back on the minimal theory itself—there will be reasonable disagreement as to whether the minimal theory is adequate for the legitimacy of a governing regime, thereby undermining the potential of the minimal theory to plug the infinite regress which was the basis of my own

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¹ Richard Bellamy, *Turtles All the Way Down? Is the Political Constitutionalist Appeal to Disagreement Self-Defeating?*, 14(1) INT’L J. CONST. L. XXX (2016); Adrienne Stone, *Putting Political Constitutionalism in its Place: A Reaction*, 14(1) INT’L J. CONST. L. XXX (2016).

² Bellamy, *supra* note 1.

critique of political constitutionalism. Bellamy elaborates on this worry in considerable detail arguing that in positing the minimal theory I am attempting to appeal directly to a Hartian “noble dream” of a “correct” understanding of legitimacy³ by “promoting a certain moral ideal [the minimal theory] outside of politics, in the sense of being beyond reasonable disagreement.”⁴ As such, for Bellamy, my minimal theory of legitimacy precludes the asking of “sensible first order political questions about the capacity of different systems to continue to be seen as legitimate in the type of societies we live in and the forms of disagreement they generate.”⁵ In this type of debate, Bellamy concludes, political constitutionalism can make a(n) (independent) substantive contribution by “showing the normative necessity and worth of such [political engagement]” through its adoption of the logic of “equal respect and concern”.⁶

Bellamy’s critique is pointed, and if sound, is devastating for my argument. However, I think that he misses an important aspect of my use of the minimal theory of legitimacy in relation to political constitutionalism. In short, I do not believe that I am claiming that the minimal theory is, itself, beyond contestation, nor that it would not be subject to disagreement. In the article, I stress that a reasonably effective and reasonably just “governing totality” enjoys a *presumption in favor* of its legitimacy. There are two points worth clarifying here. First, whereas there may be disagreement as to the “reasonableness” of the justice of particular regimes—many obviously odious regimes may achieve the level of effectiveness and stability envisaged by the minimal theory—I do not assume that all effective governing regimes are necessarily legitimate. Rather, I argue that the types of regimes to which theories of political constitutionalism apply as envisaged by Bellamy (and Waldron)—reasonably just and reasonably well-working non-pathological constitutional democracies⁷—can enjoy this presumption. Second, the presumption in the minimal theory is precisely that, a *presumption*, not a definitive reason for the legitimacy of a particular regime. As I argue in the article, the presumption is defeasible in the face of weightier

³ *Id.* at XXX.

⁴ *Id.* at XXX.

⁵ *Id.* at XXX.

⁶ *Id.* at XXX.

⁷ See Cormac Mac Amhlaigh, *Putting Political Constitutionalism in its Place*, 14(1) INT’L J. CONST. L. XXX, XXX (2016).

countervailing reasons. As such, the minimal theory offers merely *pro tanto* as opposed to *conclusive* reasons for the legitimacy of the status quo in reasonably just and reasonably effective regimes. This feature of my argument, I believe, makes clear that I do not claim to have discovered an “Archimedean point”⁸ of legitimacy nor that the minimal theory is beyond politics or contestation. Rather, it recognizes, indeed presumes, that disagreement will emerge as to the legitimacy of the minimal theory; in some ways that is precisely the point of the *minimal* theory.

The second worry, related to the first, is described in more detail by Stone and challenges my argument by claiming that we will expect disagreement to emerge as to when the “tipping point” of the minimal theory is reached; that is that we will disagree as to when, precisely, the presumption in favor of the (reasonably just and reasonably effective) status quo is no longer valid. In the article I recognize that the question of the tipping point is a complex issue, and it is true that I do not attempt to provide an answer to this question. Rather, I offer the views of others (Copp and Michelman) on this issue to illustrate that it may be higher than may be initially assumed.⁹ In light of Stone’s pressing of this issue, I would like to take the opportunity, then, to elaborate a little further on this question.

What I would argue in response to this challenge is that in the face of disagreement about the tipping point of the loss of legitimacy of a reasonably effective and just governing regime, the specific question of the legitimacy of legislative or judicial supremacy will be a contingent one. As such, *whatever the tipping point* at which a regime can be considered to lose its minimal legitimacy in a reasonably just, reasonably effective governing regime, about which we will reasonably disagree, the question of legal or political or legal constitutionalism, by itself, will have *little to contribute to that question*. This is at the same time a strong and a weak claim; it is a strong claim in that I contend that, all other things being equal, the reasons marshaled in favor of legislative supremacy *are* insufficient to tip the balance in favor of change in a regime which practices judicial supremacy (and vice versa); and it is a weak claim in the sense that the overall legitimacy of a regime is bracketed to limit the question of legitimacy to the domain of legislative and judicial supremacy (the legitimacy—and particularly its loss—of a governing regime

⁸ Bellamy, *supra* note 1, at XXX.

⁹ Mac Amhlaigh, *supra* note 7, Section 5.

obviously being a much broader and more complex issue than this). However, I don't believe I need address this broader issue to support my claims about political constitutionalism. I do not have the space to elaborate fully on this point in this brief rejoinder, however I can illustrate this by referring to Stone's example of Australia's treatment of its indigenous populations.¹⁰ The question of the "tipping point" of the legitimacy of the Australian state will turn, I argue, on the substantive question of the (lack of) protection of the rights of indigenous Australians and not whether they are protected through political or judicial means. It may be the case that in the Australian context they could be better protected by one means than the other; but I would argue that this is contingent matter in the overall substantive question of the effective protection of the rights of indigenous Australians.

I look forward to more debate on this topic, however, if there is one core message that I wished to get across in the article, it was what I believe to be the contingency of the question of legislative or judicial supremacy to the legitimacy of decision-making in the circumstances of politics. I still believe that this argument holds and in this respect, with thanks to the challenges from Bellamy and Stone, I will be clinging to my turtle.

¹⁰ Stone, *supra* note 1, at XXX.